UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 12 CR 94
	)	
vs.	)	Honorable Charles Norgle
	)	
MICHAEL R. VILLAGRAN	)	

GOVERNMENT'S CONSOLIDATED RESPONSE TO
DEFENDNANT'S POST-TRIAL MOTIONS

The UNITED STATES OF AMERICA, by GARY S. SHAPIRO, United States Attorney for the Northern District of Illinois, respectfully submits its consolidated response to defendant Michael Villagran's post-trial motions. (Doc. ##104, 105). In support, the government states as follows:

Introduction

The defendant was charged with robbing a TCF Bank in Aurora, on February 8, 2012, in violation of Title 18, United States Code, Section 2113(a). (Doc. #3). On August 15, 2013, the defendant was found guilty following a three-day jury trial at which the only contested issue was the identity of the robber.

During the trial, the jury heard overwhelming evidence of the defendant's guilt. The victim teller testified that a man fitting the defendant's description walked up to the teller counter at a TCF Bank in Aurora, handed over a demand note, and made off with eight $100 bills. Surveillance video showed the robber rush out of the building and head into a nearby Cermak Market, where the robber's coat, hat, gloves, and other items were found in an aisle. An officer with the Aurora Police Department testified that, minutes after the robbery, the defendant was found walking along the side of the Cermak Market, without a coat in the dead of winter. In the defendant's front pocket were eight $100 bills – the same amount and same denominations that were stolen from the bank.

After arrest, the defendant confessed to FBI Special Agent Adam Hoogland that he robbed the bank, offering specific details about the robbery, including that the note demanded exactly $800 and that the clothes were discarded in the aisle of the Cermak Market. The jury also heard a recorded phone call in which the defendant, after his wife accused him of robbing the bank, responded by stating, "Listen, I'm trying to do for us."

Post-trial Motions

I. Motion for Judgment of Acquittal (Doc. #104)

Defendant moves for judgment of acquittal under Federal Rule of Criminal Procedure 29(c), claiming the government failed to present evidence to establish that he was, in fact, the bank robber. The test for such a motion is whether "any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt," viewing view the evidence in the light most favorable to the government. *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011). The evidence presented at trial readily meets that standard.

Surveillance footage and testimony from the victim teller plainly established that in the afternoon of February 8, 2012, a man robbed eight $100 bills from a TCF Bank in Aurora (an FDIC insured institution), using a demand note that said, "GIVE ME $800 IF You WANT To Live I Got A GUN." The robber fled the bank and ran over to a neighboring supermarket called the Cermak Market, where he discarded many of the clothes that he wore during the robbery, including his jacket, pants, hat, and gloves. The robber then walked out of the Cermak Market. Only a few minutes later, the defendant was arrested walking along the side of the Cermak Market.

The evidence well-supported the jury's conclusion that the defendant was the robber. First, the defendant matches the physical description of the robber and was arrested just a few minutes after the robber left the Cermak Market. Second, the defendant had in his pocket eight $100 bills, the same amount and denomination that had just been robbed. Third, though the defendant discarded many of the clothes he wore during the robbery, he still had on shoes that looked identical to those worn by the robber from the surveillance footage. Fourth, the defendant confessed to FBI agents that he robbed the bank, and that confession included unique details that only the robber would know, such as the type of clothing left behind at the Cermak Market.

Defendant's motion tries mightily to come up with innocent interpretations of this damning evidence. But he merely rehashes the same arguments presented to the jury during his lawyer's summation. Those arguments did not carry the day with the jury and should not with this Court. Each of defendant's attacks on the evidence at most goes to its weight rather than its sufficiency and fails to provide a basis to disturb the jury's conclusion, which squarely rejected defendant's theories.

According to the defendant, the money from his pocket and its link to the robbery relies on "pure speculation." (Doc. #104 at 3). Though the robber did not receive "bait bills" – meaning the money could not be directly linked through serial number – eight $100 bills is a unique amount to have loose in one's pocket. That it matches the amount and denomination from the robbery is surely an incriminating fact. The same goes for the shoes that the defendant had on when he was arrested. The defendant asserts that Nike shoes are generally popular, but the brand was not the only similarity; his shoes also match the color and style of those worn by the robbery. To regard the matching shoes as an incriminating fact does not, as the defendant asserts, rely on "impermissible speculation."

The defendant also attacks the credibility of his own confession, claiming that when he admitted robbing the bank he was "the result of some outside influence." (*Id.* at 4). The defendant tried to press this theory at trial, but the only "evidence" he offered was his aggravated battery conviction, arising from when he kicked an Aurora police officer a couple of years before the robbery. One of the many troubles with this theory is that the officer he kicked was not involved in this investigation and the defendant's confession was to *FBI agents*, not to the Aurora police.

As he did at trial, the defendant places much emphasis on the other fanciful details in his confession, in an attempt to attack its reliability. That argument would carry more weight if the details he offered about the *robbery itself* were also fanciful. But they were not. He explained in detail the nature of the demand note, the amount of money robbed, the trip to the Cermak Market, and each item that was discarded at the Cermak Market. If the defendant was just "making up" the facts of the robbery, how did he get them so right? As the jury instructions provide, the jury was capable of finding credible the confession to the robbery without needing to believe everything the defendant ever said.

Finally, the defendant claims it would have been physically impossible for him to rob the bank under the time records from the surveillance footage. According to the time stamp from the TCF surveillance footage, he left the bank at 5:51 pm and was seen at the Cermak Market at 5:53:37. But the surveillance footage shows the robber running, and the Cermak Market was no more than a hundred yards from the bank. Two and a half minutes is by no means an impossible time frame to run a hundred yards and discard some clothes. Moreover, the defendant assumes incorrectly that the time stamps from the two different stores were somehow synched (they were not), so this alleged two and a half minute gap is artificial in the first place. The defense made much of this theory during its summation, and the jury reasonably rejected it.

In sum, the defendant was arrested just minutes after the TCF bank robbery with eight $100 bills in his pocket and the same shoes on. He also confessed, providing unique details that only the robber would know. The evidence was more than enough to support the jury's verdict and the defendant's motion for acquittal should be denied.

II. Motion for a New Trial (Doc. #105)

Defendant also moves for a new trial under Federal Rule of Criminal Procedure 33, which provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Such motions are left to the sound discretion of the trial court, but they are to be granted sparingly, with great caution and only in exceptional circumstances. *See, e.g., United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956). A new trial under Rule 33 should be granted only in the "most extreme cases." *United States v. Linwood*, 142 F.3d 418, 442 (7th Cir. 1998) (quotations omitted).

To prevail on a motion for a new trial, a defendant must demonstrate that substantial prejudice occurred during the trial, resulting in a gross miscarriage of justice. A defendant's burden to establish prejudicial error is a heavy one, not satisfied by unsupported conclusory allegations or speculation. *Darcy*, 351 U.S. at 462.

A. The Court Properly Held the Defendant Was Competent to Stand Trial

1. Background

On February 9, 2012, Magistrate Judge Maria Valdez ordered a competency evaluation of the defendant. Following an examination, David M. Szyhowski, Psy. D., submitted a report dated July 16, 2012. A competency hearing date was set for October 16, 2012, but on October 3, 2012, the defendant filed a motion requesting that a defense-appointed expert evaluate the defendant. (Doc. ##30, 33). The Court granted the defendant's request, and Dr. Stephen Dinwiddie examined the defendant and prepared a report dated March 21, 2012. (Doc. ##35, 48). Dr. Dinwiddie opined that "it can be concluded to a reasonable degree of medical certainty that [the defendant] shows no evidence to indicate the presence of a psychiatric disorder that would be reasonably likely to render him unfit to stand trial." (Doc. #48). After a review of the records, the Court determined the defendant was competent to stand trial.[1]

[1] Neither counsel for the government at trial was assigned to this case prior to July of 2013, and counsel does not have the benefit of a transcript of the proceedings. After undersigned counsel became counsel for the government in this case, status hearing were held on July 12 and July 26, 2013. (Doc. ##64, 65, 76). Defense counsel did not raise any issues regarding competency of the defendant at either of these hearings, despite having the opportunity to do so.

2. Analysis

This Court did not abuse its discretion in finding the defendant competent to stand trial, relying on the psychological reports authored by David Szyhowski and the defense-appointed expert, Dr. Dinwiddie, both of whom were of the opinion that the defendant was competent to stand trial.

To the extent the defendant is asserting that the Court should have held a more extensive hearing,[2] that argument should be rejected. Governing precedent rejects the argument that once a court orders a psychiatric examination of a defendant, it has to complete the process by holding a competency hearing. *United States v. Downs*, 123 F.3d 637, 641 (7th Cir. 1997). Under 18 U.S.C. § 4241(a), a court must hold a hearing "if there is reasonable cause to believe the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent." A decision to hold a competency hearing rests with the discretion of the trial court. *Downs*, 123 F.3d at 641 (holding the court did not abuse its discretion when it declined to hold a competency hearing after the psychiatrist's report found defendant was competent to stand trial). "[A] district court's duty is the same

[2] The cases cited by the defendant in his motion all concern defendants who were ordered committed prior to trial to allow for a psychiatric evaluation pursuant to 18 U.S.C. § 4247(b). (Doc. #105 at 2). Defendant does not argue in his motion that he was improperly committed to custody prior to trial. *Id.*

even after a psychiatric evaluation, namely, to determine whether the evidence before the court mandates a hearing under the standard of §4241(a). *Id.*

In this case, the Court received two psychiatric reports concluding that the defendant was competent, and it would not be an abuse of discretion for the Court to decline to hold a competency hearing.[3]

B. The Court Properly Ruled the Defendant Was to be Represented by Counsel

The defendant argues that his right to self-representation was denied by the Court, (Doc. #105 at 2), yet he concedes that, when asked by the Court during status hearings if he wanted to represent himself, he remained silent and failed to request to represent himself. During several points during court proceedings, the defendant claimed he did not consent and attempted to speak at the same time as the Court. On more than one occasion the Court warned the defendant that his silence in the face of a question about whether or not he wanted to represent himself would be interpreted as the defendant not wanting to represent himself.

[3] Without the benefit of a transcript, the record does not reflect what occurred during the hearing on May 10, 2013, when the defendant was found by the Court to be competent. (Doc. 52). Assuming no hearing was held, the Court did not abuse its discretion based on the evidence that had been presented.

The Seventh Circuit has "recognized the limits to the right to self-representation," including that "when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel." *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998). It does not matter if the trial court "rule[s] prospectively, before [a defendant] had a chance to represent himself" and, "[f]aced with a pattern of noncompliance and bellligerance, the court [is] not obligated to allow [a defendant] to proceed on his own." *United States v. Patterson*, 397 Fed.Appx. 209, 213 (7th Cir. 2010).

In *Brock*, the defendant, like Villagran, refused to answer the Court's questions, and repeatedly challenged the Court's authority. 159 F.3d at 1080. Brock also refused to answer the Court's question about whether or not he wanted to proceed *pro se*. *Id*. The Court held that, in light of these disruptions, it was within the district court's discretion not to allow the defendant to proceed *pro se*. *Id., see also id*. at 1081 n.3 (the defendant's conduct "showed a lack of good faith cooperation with the court such that the proceedings were severely impaired"). As in *Brock*, this Court acted within its discretion in allowing the defendant's counsel to continue to represent him.

C. Defendant is Not Entitled to a New Trial Based on $3.02

1. Background

On the night of the defendant's arrest, various pieces of personal property were retained by law enforcement, including: the defendant's cell phone, a wedding ring, a one dollar bill, $2.02 in change, and a LINK card. Special Agent Adam Hoogland made several attempts to return the defendant's personal property to his wife by leaving her multiple voice mail messages. Agent Hoogland was not, however, able to get in touch with her to return the personal property. When the defendant's wife came to the courtroom on the last day of trial, Agent Hoogland returned these items to her. Because these items were personal property, they were not logged in as evidence and, accordingly, a log of these items was inadvertently not provided to defense counsel.[4]

Defense counsel was aware that the defendant possessed some spare change when he was arrested. By letter dated August 7, 2013, the government provided the defendant with a copy of a Cermak Market receipt,

[4] Defense counsel was aware defendant had a cell phone on his person because a FBI interview report from the night of the robbery states that "Villagran was asked to sign a Consent to Search Form (FD-26) for his cellular telephone," which Villagran declined to sign. That report was bates labeled 12 CR 94 00016, and was provided to defense counsel on March 22, 2012.

showing that a bottle of coke was purchased minutes after the bank robbery using $2.00 in cash, with change given of $0.39. (Ex. A).

Along with the personal property returned to the defendant's wife on the last date of trial, Special Agent Hoogland also returned to her a pair of sunglasses that had been left at Cermak Market. These sunglasses were the same sunglasses that were recovered from the scene, and photographs of the sunglasses were provided to defense counsel on August 1, 2013. (Ex. B). The defendant's assertion that there were two pairs of sunglasses recovered is mistaken. (Doc. #105 at 5). The sunglasses were properly disclosed to defense counsel, and do not give grounds for granting a new trial.

2. Analysis

In order for the defendant to prevail in a motion for a new trial based on newly-discovered evidence, the defendant must show that the evidence (1) came to his knowledge only after trial; (2) could not have been discovered sooner had the defendant exercised due diligence; (3) is material, and not merely impeaching or cumulative, and (4) probably would have led to an acquittal in the event of retrial. *United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982).

The presence of loose change on the defendant's person is not material, and certainly would not "probably. . . lead to an acquittal in the event of a retrial." The defendant fit the physical description of the bank robber, was arrested near the bank a few minutes after the bank robbery, and admitted to robbing the bank in a detailed confession. The defendant had $800 in his pocket in the same denominations as what was stolen from the bank. The presence of an extra dollar bill and some pocket change is not exculpatory; it does not change the fact that $800 in the proper denominations was found in his pocket. Additionally, the receipt described above was entered into evidence, so the jury was aware that the defendant had at least $2.00 in cash on his person after the robbery, not eight $100 bills and nothing else. The pocket change is not material, and should not be the basis for a new trial.

D. The Court Properly Admitted Voice Identification Testimony

The defendant now objects to Special Agent Adam Hoogland's voice identification of the defendant on a jail call, despite failing to make such objection at trial, even after the government explained at sidebar, prior to the testimony of both Vincente Blas and Special Agent Hoogland, that it planned to authenticate the jail call recording by voice identification testimony by the Special Agent.

Opinion about a voice by someone familiar with the voice is admissible under Federal Rule of Evidence 901(b)(5). "Voice identification is 'not a subject of expert testimony.'" *United States v. Recendiz*, 557 F.3d 511, 527 (7th Cir. 2009). Special Agent Hoogland testified about his lengthy interview with the defendant and how that conversation made him familiar with the defendant's voice. That testimony, which came in without objection, complied with Rule 901(b)(5) and did not require an expert disclosure under Federal Rule of Criminal Procedure 16(a)(1)(E).

E. The Court Properly Admitted the FDIC Certificate

The defendant claims that the FDIC certificate that was entered into evidence as Government Exhibit 2 was improperly admitted, and that TCF Security Officer David Nelson should not have been allowed to testify that the bank was insured at the time of the robbery. (Doc. #105 at 8). But controlling precedent holds to the contrary: "an FDIC certificate, together with a bank employee's testimony based on personal knowledge, are sufficient to support a conviction" for bank robbery. *United States v. Hagler*, 700 F.3d 1091, 1100 (7th Cir. 2012).

The FDIC certificate, which contained a raised seal, was properly admitted under Federal Rule of Evidence 902(1), and engendered no objection from the defense. In his motion, the defendant claims that the Court entered the exhibit into evidence before he had a chance to object. (Doc. #105 at 7). But the document was not immediately published, affording the defendant ample time to raise any objections or issues with the Court before the jury viewed the certificate. Even if the defendant had objected, it would have been without merit. A FDIC certificate is proper to establish a bank's status as insured by the FDIC. *See, e.g., Hagler*, 700 F.3d at 1100; *United States v. Cunningham*, 393 Fed.Appx. 403, 406 (7th Cir. 2010). A FDIC certificate is created and maintained by all insured banks; because it is not made in anticipation of future criminal litigation, it does not fall under *Crawford*. *See United States v. Gilbertson*, 435 F.3d 790, 796 (7th Cir. 2006).

The testimony of TCF Security Officer David Nelson further established that the bank was insured at the time of the robbery. Nelson testified that, as part of his duties, he maintains the FDIC certificate for the branch. Not only did the defendant fail to object, the testimony was entirely proper: the testimony of a security consultant for a bank is sufficient to establish that a bank was insured by the FDIC on the date of the robbery, as the security consultant had personal knowledge as part of his job duties. *See Hagler*, 700 F.3d at 1100.

The FDIC Certificate, coupled with the testimony of a bank employee with knowledge of the FDIC insurance on the date of the robbery, was sufficient to prove that the bank was insured by the FDIC on the date of the robbery.

Conclusion

For these reasons, the United States respectfully requests that this Court deny the defendant's motions.

Respectfully submitted,

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